IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/07/2002

CORAM

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN

S.A.No.1818 of 1989

Tirisanku .. Appellant

-Vs-

Kasinathan .. Respondent

Second Appeal against the judgment and decree dated 28.2.1989 in A. S.No.23 of 1988 on the file of the Subordinate Judge, Villupuram, confirming the decree and judgment dated 27.1.1988 in O.S.No.1197 of 1985 on the file of the District Munsif, Villupuram.

!For appellant : Mr.R.Subramanian

^For respondent : Mr.R.Saseetharan
for Mr.P.G.Xavier

:JUDGMENT

The unsuccessful plaintiff in O.S.No.1197 of 1985 before the learned District Munsif, Villupuram, is the appellant in this second appeal.

2. Heard both sides.
3. The appellant/plaintiff filed a suit for declaration and injunction based on a sale deed dated 5.10.1984 marked as Ex.A2, for having purchased the suit property of an extent of 1 acre 20 cents.

4. The suit was resisted by the respondent/defendant on the basis of Ex.B2, an agreement of sale entered into between the respondent/ defendant and the original owner dated 22.6.1984, contending that the respondent/defendant also, by his Advocate’s notice dated 7.9.1985 marked as Ex.B3, issued to the original owner of the property, questioning the sale in favour of the appellant/plaintiff under Ex.A2, to which the original owner sent a reply dated 24.9.1985 marked as Ex.B4, stating that the respondent/defendant failed to settle the balance sale consideration and get the sale deed executed and registered in his favour.

5. Upon the above rival contentions, the Courts below framed the

following issues:
i. Whether the sale deed dated 5.10.1984, marked as Ex.A2 is true and valid?
ii. Whether the agreement of sale dated 22.6.1984, marked as Ex.B2, is true and valid? and
iii. Whether the appellant/plaintiff is a bona fide purchaser of the suit property?

6. The appellant/plaintiff examined himself as P.W.1 and marked 11 documents as Exs.A1 to A11, of which, Ex.A2 is the registered sale deed dated 5.10.1984 executed by the original owner in favour of the appellant/plaintiff, Exs.A3 and A4 are pattas with regard to the suit property, which stand in the name of the appellant/plaintiff, Exs.A6 to A10 are kist receipts, and Ex.A11 is the chitta and adangal in the name of the plaintiff.

7. The defendant examined himself as DW1 and marked 13 documents as Exs.B1 to B13, of which, Ex.B2 is the agreement of sale dated 22.6.19 84, Ex.B3 is the notice dated 7.9.1985, issued by the respondent/ defendant to the original owner, questioning the sale dated 5.10.1984 in favour of the plaintiff and Ex.B4 dated 24.9.1985 is the reply by the original owner to the respondent/defendant.

8. The trial Court, considering the above evidence on record, both oral and documentary, came to the conclusion that the plaintiff/ appellant is not a bona fide purchaser, as there was already a sale agreement between the defendant and the original owner, marked as Ex.B2 dated 22.6.1984, which was partly performed on the date of execution of the agreement itself, and therefore, giving the benefit of Section 53-A of the Transfer of Property Act, the trial Court dismissed the suit and the same was confirmed by the appellate Court by order dated 28 .2.1989 in A.S.No.23 of 1988. Hence, the above second appeal.

9. The only substantial question of law that arose in this appeal is whether the Courts below are right in giving the benefit of Section 53-A of the Transfer of Property Act to the respondent/defendant under the facts and circumstances of the case?

10. In this regard, I am obliged to refer Section 53-A of the Transfer of Property Act, which reads as follows:

Section 53A of the Transfer of Property Act, 1882:

Part performance: Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part

of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

PROVIDED that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

11. The Apex Court, in GOVINDRAO MAHADIK V. DEVI SAHAI reported in AIR 1982 SC 989, interpreting Section 53-A of the Transfer of Property Act, has held as follows:
" 10. In order to qualify for the protection conferred by the equitable doctrine of part performance as enacted in S.53-A, the following facts will have to be established:
" (1) That the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(2) That the transferee has in part-performance of the contract taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract;

(3) That the transferee has done some act in furtherance of the contract; and

(4) That the transferee has already or is willing to perform his part of the contract.

(see Nathulal v. Phool Chand, (1970) 2 SCR 854 at p.858: (AIR 1970 SC 546 at p.548)). There was no dispute that the aforementioned conditions have to be satisfied to make good the defence of part performance. The controversy is on their application to the facts of the case.

12. In the instant case, the documents, which are relied upon by the appellant/plaintiff, viz., Exs.A2 to A11, establish the fact that under Ex.A2-registered sale deed, the possession of the suit property has been passed on from the original owner to the appellant/plaintiff.

13. The contention of the respondent/defendant, who claims the benefit under Section 53-A of the Transfer of Property Act, that he has, in part-performance of the contract, taken possession of the property and continues to be in possession of the same, has become questionable. On the other hand, the original owner himself, under Ex.B4 dated 24.9.1985, replied that the respondent/defendant failed to perform his part of obligation and was also not ready and willing to settle the balance sale consideration and to get

the sale deed executed in his favour. If that be so, in my considered opinion, both the Courts below have erred in having given the benefit of Section 53-A of the Transfer of Property Act, to the respondent/defendant, when the respondent/defendant was not ready and willing to perform his part of obligation as per Ex.B2, which is evident from Ex.B4 dated 24.9.1985. On the other hand, Ex.A2, registered sale deed dated 22.6.1984, had not been challenged by the original owner on any ground. That apart, the appellant/plaintiff has also proved his possession and enjoyment of the suit property as per Exs.A2 to A11, referred to above. Hence, I am obliged to hold that the Courts below have erred in giving benefit of Section 53-A of the Transfer of Property Act to the respondent/ defendant and dismissing the suit on that ground, in spite of a positive evidence adduced by the appellant/plaintiff, as referred to above. Answering that the Courts below erred in giving the benefit of part performance of the contract under Section 53-A of the Transfer of Property Act to the respondent/defendant, the decree and judgment of the Courts below are set aside.

13. However, considering the close relationship between the parties that the original owner, appellant/plaintiff and the respondent/defendant are all brothers and the fact that the defendant has also paid a sum of Rs.3,000/- to the original owner, to meet the ends of justice, I am of the considered opinion that, out of 120 cents, about 40 cents, viz., Item No.7 shall be given to the respondent/defendant towards the amount already parted with the original owner, and as a result, there shall be a decree to the effect that the appellant/ plaintiff shall be entitled to a declaration and injunction only with regard to 80 cents, viz., item Nos.1 to 6. With regard to the other items, the suit stands dismissed. No costs.

In the result, the appeal is partly allowed. No costs.

Index : Yes
Internet: Yes

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To:
1. The Subordinate Judge, Villupuram.
2. The District Munsif, Villupuram.

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